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THE PRINCIPLE OF SPECIFIC PERFORMANCE OF OBLIGATIONS: ITS ESSENCE AND ROLE AT THE PRESENT STAGE OF THE CIVIL LEGISLATION DEVELOPMENT IN THE REPUBLIC OF TAJIKISTAN

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Introduction: *the article deals with the essence of the obligation specific performance principle and its role in the development of legislation in the Republic of Tajikistan.* ***Purpose:*** *the author analyzes and compares various approaches to defining the legal essence of the principle of specific performance of a contract.* ***Methods:*** *the following methods form the methodological basis of this research: a dialectical method, synthesis, analysis, a comparative legal method, and a system approach.* ***Results:*** *the author believes that rules should be established by legislation according to which specific performance of an obligation is first of all expressed in committing acts which constitute its subject. In the conditions of commodity-money relations, it is important for the creditor to get from the debtor the whole volume of the outstanding obligation. The main aim of the obligation specific performance principle must be to provide the creditor with one of the ways to protect his legal rights and interests so he has the right to compel the debtor to execution of his contractual obligations until the moment the creditor prefers his interests to be satisfied by means of pecuniary indemnity. Thus, the essence of the obligation specific performance principle has to be expressed in the establishment of a possibility for the creditor to use compulsion against the debtor. The possibility of compulsory execution has to only be acknowledged for the creditor. It means that the subject of the obligation remains invariable until the creditor agrees to terminate the contract and receive pecuniary indemnity.* ***Conclusions:*** *in the conditions of market economy, when the autonomy of will of the parties in economic relations is proclaimed to be the basic principle of civil law, bilateral obligatory application of the obligation specific performance principle has no right to existence.*

Keywords: principles of performance; specific performance; debtor; creditor; contract; civil legislation of the Republic of Tajikistan; autonomy of will; subject of a contract

Information in Russian

СУЩНОСТЬ И РОЛЬ ПРИНЦИПА РЕАЛЬНОГО ИСПОЛНЕНИЯ ОБЯЗАТЕЛЬСТВ НА СОВРЕМЕННОМ ЭТАПЕ СТАНОВЛЕНИЯ ГРАЖДАНСКОГО ЗАКОНОДАТЕЛЬСТВА РЕСПУБЛИКИ ТАДЖИКИСТАН

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Введение: *в статье рассматриваются дискуссионные вопросы о сущности принципа реального исполнения обязательств и его роли в становлении законодательства Республики Таджикистан.* ***Цель:*** *автор анализирует и сопоставляет различные подходы к определению правовой сущности принципа реального исполнения договора.* ***Методы:*** *методологическую основу данного исследования составляет совокупность методов научного познания: диалектического, синтеза, анализа, сравнительно-правового, системного.* ***Результаты:*** *автор считает, что должно стать нормой установление законодательством правил, согласно которым реальное исполнение обязательства выражается, прежде всего, в совершении действий, составляющих его предмет. Кредитору в условиях товарно-денежных отношений важно будет получить от должника весь объем неисполненного обязательства. Основной целью принципа реального исполнения обязательств в пространстве формирования свободного рынка должно стать обеспечение кредитора одним из способов защиты его законных прав и интересов, где за ним признается право принудить должника к исполнению договорных обязательств до момента, пока сам кредитор не выберет предпочтительность денежного возмещения. При этом сущность принципа реального исполнения должна выражаться в установлении для кредитора возможности использования принуждения в отношении не исполнившего обязательства должника. Возможность принудительного исполнения должна быть признана исключительно за кредитором: предмет обязательства остается неизменным до тех пор, пока сам кредитор не согласится на расторжение договора и получение денежной компенсации.* ***Выводы:*** *в условиях становления рыночной экономики, когда автономия воли сторон в хозяйственных отношениях провозглашена основным принципом гражданского права, двухстороннее обязательное применение принципа реального исполнения не имеет права на существование.*

Ключевые слова: принципы исполнения; реальное исполнение; должник; кредитор; договор; гражданское законодательство Республики Таджикистан; автономия воли; предмет договора

Introduction

In science of civil law performance of obligations was always perceived as the final stage of the contractual relations within which the debtor by means of implementation of the lawful purposeful strong-willed actions directed to satisfaction of legitimate interests of the creditor stops this obligation [16, p. 47]. For this reason execution of the obligation in legal literature was always considered as the stage major according to the destination.

Main content

Rules to which process of performance of obligations submits and which in civil law are understood as the principles of performance of obligations [12, p. 305], at various stages of formation of civil science were interpreted in different ways. So, in the conditions of socialist managing when, according to O. S. Ioffe, all "… is directed to satisfaction of material and cultural requirements of all society and everyone his members" [6, p. 60], the executions of contractual obligations corresponding the rule in nature was predetermined by the main beginnings of a state planned economy. In compliance with it the socialist civil law proceeded from the general principles according to which execution of the obligation, first of all, needs to be carried out in strict accordance with planned and administrative acts and other bases specified in the law. Only performance of the contract in nature "leads to that implementation of the plan which represents not only the main, but also the only purpose of the contract..." [6, p. 60].

Formation and formation of the market relations, emergence in this regard the new institutes of civil law connected with implementation

enterprise and commercial activity, predetermined relevance and interest in a research of the basic principles of performance of obligations. Reconsideration of earlier developed principles for the purpose of their adaptation to new conditions of managing becomes the main objective of a legal research of the basic principles of performance of obligations.

It is indisputable that the content of the basic principles of performance of obligations is predetermined by the civil legal relationship existing within certain and not always identical socioeconomic structures when actions of one principles of performance of obligations are rather equally shown in any historical types of civil law, and actions of others, on the contrary, reveal special lines of this or that historical type of civil law.

So, it is possible to refer the principle of appropriate performance of obligations, the principle of impossibility of unilateral refusal of their execution and unilateral change of their conditions and, on the contrary, such principles of performance of obligations as the principle of mutual cooperation of the parties in course of execution of obligations to the steadiest principles, the principle of economic execution, according to the contents were always more dependent on the concrete historically developed civil legal relationship.

In the theory of civil law of the most debatable the perspective of the principle of real performance of obligations where a number of scientists suggest to consider this principle inherent for any obligation [5, p. 52], others connect its action only with socialist civil circulation [2, p. 699; 16, p. 49]. There is no consensus about the value of the principle of real execution and means providing its application and in legal literature. And, the most important, still in science of civil law is not present the answer concerning compliance of this principle to the operating realities of market economy.

Today in the civil legislation the principle of real execution of contractual obligations is formulated mainly in the provision of item 1 of Art. 427 of RT Group according to which payment of a penalty and indemnification in case of inadequate execution of the obligation do not exempt the debtor from execution of the obligation in nature if other is not provided by the law and the contract, at the same time the specified provision is distributed to all types of contractual obligations and in legal literature is carried to number of measures of ensuring real execution.

The naturalness of performance of obligations declared by the principle which is not assuming replacement of the action provided by the contract with monetary compensation according to some scientists (E. E. Bogdanova), provides to participants of the contractual relations realization of their interests which they pursued at the conclusion of the contract that, she considers, quite conforms to the main requirements of modern economic realities [1, p. 31]. The principle of real performance of obligations assumes "indispensability" of the requirement about execution in nature on monetary or other compensation at will of the debtor. It is difficult not to agree with E. E. Bogdanova concerning need to provide realization of the basic real needs of a consumer without their replacement with a monetary substitute. The norm when rules according to which real execution of the obligation was expressed, first of all, in commission of the actions making its subject legislatively are established has to become natural. As well for the creditor within the commodity-money relations naturally ideal will be to receive all contents of not fulfilled obligation from the debtor.

In this regard it is represented to us that providing the creditor with one of ways of protection of its legitimate rights and interests where behind it the possibility to force the debtor to execution of contractual obligations till the moment is acknowledged has to become a main objective of the principle of real performance of obligations in the conditions of formation of the free market until it (creditor) has a preference to satisfy the interests by means of monetary compensation. At the same time the essence of the principle of real execution has to be expressed in establishment for the creditor of a possibility of use of coercion in respect of not fulfilled obligation of the debtor where the possibility of compulsory execution has to be acknowledged only for the creditor when the subject of the obligation remains invariable until the creditor does not agree to cancellation of the contract and receiving monetary compensation.

Besides, the possibility of the creditor to achieve from the debtor of compulsory execution of the obligation in nature by means of inadmissibility of the replacement provided by the contract of action by monetary compensation caused in legal literature opinion according to which in the absence of real execution even approach of civil responsibility does not exempt the debtor from a duty to perform all operations provided by the obligation [14, p. 35]. At the same time, on the one hand, payment of monetary sanctions (penalty) does not exempt the debtor from a duty to fulfill this obligation, and on the other hand, obliges the creditor to demand such execution, without being content with the offered monetary compensation.

However simple declaration of rules of compulsory execution by the debtor of not fulfilled obligations will hardly be actually realized by the creditor without legislative providing the corresponding mechanisms guaranteeing appropriate application of this way of protection of its interests. In legal literature it was repeatedly told about existence in the civil legislation of such means providing the principle of real execution as presentation in court of the claim for award in nature [8, p. 12]. So, still V. K. Raykher noted that the judgment on compulsory performance of obligations is the strongest way of restoration of the broken economic links [11, p. 58]. And in general, if to speak about compliance to the doctrine of performance of obligations existing for that period according to which economic contracts have to be executed in proportion to their literal value without any retreats when even payment of a penalty not persons behind protection of the violated rights. In this plan the point of view of S. V. Sarbash who claims that at the heart of the principle of real performance of obligations exclusively free strong-willed actions of the debtor directed to execution of a subject of the obligation in nature [15, p. 63]. According to S. V. Sarbash, any coercion to discharge of duty in nature represents a kind of one of ways of protection of the violated civil rights and if from a concept of execution of the obligation of nature to clean quality of compulsoriness then it will be identical to the principle of real execution [15, p. 63] H. R. Rakhmankulov, having generalized the views of a ratio of the principle of real execution which appeared in science of civil law with the requirement to fulfill this obligation in nature, came to a conclusion that action of the principle is shown at all stages of development of the obligation and acts as one of requirements of appropriate execution and only after the malfunction allowed by the debtor – already turns into the independent requirement about execution in nature [13, p. 54]. The similar point of view in the work was stated by O. S. Ioffe, having in addition pointed that the principle of real execution is embodied in the requirement about execution in nature with observance of all conditions of appropriate execution which remain feasible and after the allowed violation [6, p. 60].

However claims for compulsory execution in nature were put quite seldom into practice. It is more than that, as soon as possible participants of the economic relations, on the contrary, tried to receive monetary compensation. Ignoring of this way of protection did not remain unnoticed and in science of civil law. So, already N. I. Krasnov noted that the claim for execution in nature is applicable only concerning individual and certain and, with certain reservations, patrimonial things [9, p. 79]. At the same time even if decisions were made and requirements about reclamation of patrimonial things through court, and then real execution of such duties were met how to perform works, to render services, remained unrealized. Even more critically concerning the claim for coercion in nature expressed to F. I. Gavza and A. V. Venediktov which noted that direct coercion on confiscation of patrimonial things is impossible [4, p. 99; 3, p. 163]. It is hard to agree with the adduced arguments, it is quite difficult to force the debtor to render forcibly service or under duress to force to perform work. Besides, flexible approach to compulsory execution of the obligation in nature is caused by the nature of the obligations relations. It is impossible to oblige the debtor to make any action if he does not wish it to do. Only the property sanction,

i. e. actually replacing performance of the obligation in the form of monetary compensation.

For this reason, estimating represented in the law and in legal science definition of the principle of specific performance obligations, many scholars have rightly noted that the imperative requirement, submitted to the creditor, within the framework of the principle of specific performance, to compel the debtor to fulfill contractual obligations in kind significantly undermines the ability of civil turnover participants freely choose partners and, accordingly, reduces its interest in the expediency of forcing the debtor to fulfill the obligation on the court [8, p. 12]. In the contemporary economy creditor, it is much more convenient to collect from the debtor's bad faith damages and (or) a penalty and sign a contract with a contractor worthy, to recover from the offender the difference in prices, they noted.

In the legal literature of the scholars, considering the principle of the real performance of an obligation as a general rule, according to which the debtor can not escape from the need to fulfill the obligation in kind, pronounced this "indispensability", where the creditor does not just could not terminate the contract due to default of the debtor, and should I was insisting on its performance. "The lender may not add up to the debtor's obligation lying on it, and vice versa, shall require that the execution was made in kind" [10, p. 96]. In fact, they note, the creditor's right – to force the debtor to fulfill his obligation to become, and in an interesting duty to be responsible for the outstanding obligations of the debtor.

In civil law science the phenomenon of the principle of specific performance has been described as his "two-sided" nature [9, p. 42]. The essence of this rule is that in the relations between socialist organizations are not allowed to replace the execution of monetary compensation. In relations between citizens and their participation in the citizen-creditor obligation to provide choice to demand from the debtor's specific performance and compensation of damages, payment of a penalty (if installed) or withdraw from the contract and claim for the compensation of damages. Thus, in the Soviet era, this rule applied in different ways, depending on who was the subject of the obligation (citizens or socialist organizations). This approach is explained by the fact that the majority of commitments between the organizations was based on scheduled tasks, where the replacement of the execution of monetary compensation is not tolerated, as the basis of the principle of specific performance was planned nature of socialist economy and the obligation to implement the plan. 96]. At the same time lying on the lender the obligation to demand specific performance, according to scientists, it was not civil, and administrative and legal wore character, as it was a creditor's obligation not to the contractor, but to the administrative governmental authority which approved the planned Treaty [16, p. 49]. A similar thought in his monograph on the principle of the real performance of the obligation in the Soviet civil law, was expressed by N. I. Krasnov, who noted that the real reason for such a relationship to the actual execution of the contract is amended essence of the treaty bears in conditions of economic character means an administrative distribution of wealth [9, p. 79]. The importance of a planned target in the regulation of contractual relations was also stressed by J. R. Rakhmankulov, who noted that in a socialist economy is regarded as a "base occurrence and termination of the obligation, and accordingly, the debtor, payment of the prescribed by law or contract penalties, not the right to refuse performance of the obligation in kind, if the planned target upon which the obligation has not lost force" [13, p. 54].

Today, in the conditions of market economy, where party autonomy in economic relations proclaimed the basic principles of civil law, bilateral compulsory application of the principle of specific performance has no right to exist. Firstly, in a free market in the application of the principle of actual execution of contracts of civil law should not make a difference, depending on whether its members are legal entities or citizens. Secondly, the essence of the principle of specific performance on the one hand, should express rule, obliging the debtor to comply with terms of the contract, and if this does not happen, then allowing to force him to fulfill the obligation in kind. And, thirdly, on the contrary, under the actual execution creditor principle of the right to choose to obtain from the debtor's immediate object of execution or, in the case of default, to demand

from the debtor to deliver cash compensation in the amount allowing to recover losses from breach of contract. Lender may, but shall not be obliged to require proper fulfillment of obligations by the use of direct or indirect coercion.

The interest of the lender to the real performance of its requirements is dictated by the presence of his interest in obtaining a high profit business within the construction and delivery of finished residential complex. On the contrary, if the lender for any reason lost interest in the production of natural obligations, under these circumstances, it appears that the action of the principle of specific performance should be stopped and the lender will have the right to require the surrogate damages in monetary terms. At the same time it is clear that within the framework of the implementation of the principle of specific performance replacement enforcement of the obligation in kind to financial compensation can not be performed by the debtor will. In fact, in a free market, the main content of the real performance of the obligation should be the rule, predetermining that the subject of the obligation can not be arbitrarily replaced by the debtor for money, and remains unchanged as long as the creditor himself, or does not agree to cancel contract and a cash substitute performance in place of it, or not subject seeks performance through the application of methods of direct or indirect coercion to which, as a general rule, there is an appropriate right. Simply saying, as soon as the lender puts a requirement on the real performance of the obligation, the debtor is obliged to satisfy it. In this regard, in our opinion, in the case of improper performance of the real essence of the principle is manifested in the performance that determines the behavior of the debtor when, even with the payment of penalties and damages it is not relieved of the obligation in kind.

However, today in the science of civil law principle of the real performance of the obligation has been considered not only as an obligation of the debtor to fulfill the obligation in full compliance with the terms of the subject matter of the contract, even when the payment of a penalty (fine, penalty), or damages can not be released from his obligations in the execution of nature and it began to be perceived more as a necessity to fulfill the obligation in kind: exclusively at the expense of the debtor. Thus, according to S. V. Sarbash, this interpretation of the principle of specific performance has emerged from the contents of Art. 218, 284, 360 of the Civil Code RFSFR, where in the case of default by the debtor received the obligations set forth the following rights to the entitled party: creditor has to perform the work at the expense of the debtor; tenant landlord responsibilities at default by the latter to make major repairs Rented things; the customer, in case of failure by the contractor, address deficiencies in the prescribed period, charge rectification work to a third party by the contractor [15, p. 64]. It was noted by Mr. S. V. Sarbash that the main parameters of the real performance of the obligation becomes its subject. According to him, "delivering the promise is one of the most important elements of performance and in most cases is interest to the lender, even if the other conditions of liability are not met. From a practical point of view, in many cases, this performance will be taken as the actual reception performance is crucial to the lender" [15, p. 64].

This rule is reflected in the modern civil law. 428 of the Civil Code of RT, in which in case of default by the debtor the obligation to produce and transfer a thing in ownership, economic management or operational management, or perform some work for him or to provide a service to the lender shall have the right within a reasonable period of performance of the obligation to entrust to third parties for a reasonable price, or to perform it on their own and require the debtor compensation for the necessary expenses. The content of the abovementioned article was the basis for V. V. Rovniy that today at the real performance of the rules for the lender it is important to get desired property benefits, amounting the subject of obligations. According to the scientist, the subjective side of the actual execution of the principle for the lender is not so important, the main thing that he was the subject of a direct obligation and this performance shall be made by the debtor [14, p. 38].

The generalization made by V. V. Rovniy and S. V. Sarbash is not without some foundation. Sometimes for lender it is much easier and more profitable to obtain from the debtor compensation in the amount of unsettled and instruct performance of the actual obligation to a third party at the expense of the proceeds money, rather than

wait for the natural performance of the direct debtor, who may not be able to fulfill this obligation. However, on the other hand, it is impossible not to draw attention to the fact that not all commitments may be executed by third parties due to the nature of the debtor. Thus, according to N. Krasnov, claims for specific performance by the debtor may be justified in relation to individually defined and, with certain reservations, some generic things. The author believes that the reclamation of specific performance duties to perform work or provide services is unacceptable [9, p. 79].

Nevertheless, we believe, it is impossible to agree with the viewpoint of V. V. Rovniy and S. V. Sarbash for some other reason. Based on the requirements of Art. 427 of the Civil Code of RT, for improper performance of the obligation the basic essence of the principle of its actual performance is expressed, above all, of acts by the debtor, are the subject of this commitment, without replacing them with any monetary compensation. In this case, the lender is not indifferent with the subject composition of execution, as improperly executed obligation should be completed by the debtor directly.

And only when the lender decides that the debtor is unable to properly complete the undertaken obligations, he is entitled to fulfill this obligation either by himself or delegate this obligation to a third party, but at the expense of debtor.

In fact, the lender agrees to surrogacy refund the debtor, through which its requirements can be met either by themselves they either picked up their third party. In this case the lender when deciding on the actual replenishment of unfulfilled obligations by a third party, suspend the operation of the principle of actual execution of this obligation, despite the fact that as a result of replacement of the debtor, he (the creditor) will get exactly the action that was the subject of this improperly executed obligation.

Finally, in the science of civil law it suggested that the principle of specific performance obligations as such is not in the Obligations Act. According to V.S Tolstoy, this conclusion is based on the fact that in fact for the lender is able to choose whether to compel the debtor to fulfill the contract after a breach or require the payment of monetary compensation. In addition, the law, as pointed out by VS Tolstoy, provides numerous circumstances, under which the execution may be replaced by monetary compensation. All this leads to the conclusion that "specific performance as a principle in our civil law is not available" [16, p. 52].

Conclusion

It seems to us that it is necessary to agree with the position of S. V. Sarbash that, albeit with a certain degree of conditionality, recognizes specific performance as one of the principles of performance [15, p. 64]. Of course, in a market difficult to accept this principle in a comprehensive and applies to all resulting in the civil circulation of obligation relationship. So, not all obligations can be fulfilled according to the rules of the real specific performance. In particular, consider the principle of the real performance of the obligation is not applicable in cases where as a result of improper performance of obligations by the debtor the creditor lost interest in natural execution, or by virtue of any objective reasons why the execution was not possible, either the debtor cannot fulfill the obligation in kind, arisen as a result of his physical inability. As noted above, the rule of specific performance can be justified and is applicable to the obligations related to the transfer of individual-specific things, however, to demand the fulfillment of obligations in nature when sending generic things and discharge of duties in terms of the provision of services and performance of works in case of improper fulfillment of these obligations is impossible.

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